

§ 790.11

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of a contract, has paid employees for certain activities performed. One of the sponsors of the legislation in the House of Representatives indicated that the intention was not only “to protect every collective bargaining agreement about these activities” but “to protect the agreement between one workman and his employer” and “every practice or custom which we assume must have entered into the minds of the people when they made the contract.”⁷⁹

(d) The words, “custom or practice,” as used in the Portal Act, do not refer to industry custom or the habits of the community which are familiar to the people; these words are qualified by the phrase “in effect * * * at the establishment or other place where such employee was employed.” The compensability of an activity under custom or practice, for purposes of this Act, is tested by the custom or the practice at the “particular place of business,” “plant,” “mine,” “factory,” “forest,” etc.⁸⁰

(e) “The custom or practice” by which compensability of an activity is tested under the statute is one “covering such activity.” Thus, a custom or practice to pay for washing up in the plant after the end of the workday, for example, would not necessarily establish the compensability of walking time thereafter from the washroom in the plant to the plant gate. It is enough, however, if there is a custom or practice covering “such activity”; there is no provision, as there is with regard to contracts, that the custom or practice be one “between such employee, his agent, or collective-bargaining representative, and his employer.”⁸¹

(f) Another qualification of the “custom or practice” referred to in the statute is that it be “not inconsistent with a written or non-written contract” of the kind mentioned therein. If the contract is silent on the question of compensability of the activity, a custom or practice to pay for it would not be inconsistent with the con-

tract.⁸² However, the intent of the provision is that a custom or practice which is inconsistent with the terms of any such contract shall not be taken into account in determining whether such an activity is compensable.⁸³

§ 790.11 Contract, custom or practice in effect “at the time of such activity.”

The “contract,” “custom” or “practice” on which the compensability of the activities referred to in section 4 of the Portal Act may be based, is a contract, custom or practice in effect “at the time of such activity.” Thus, the compensability of such an activity, and its inclusion in computation of hours worked, is not determinable by a custom or practice which had been terminated before the activity was engaged in or was adopted some time after the activity was performed. This phrase would also seem to permit recognition of changes in customs, practices and agreements which reflect changes in labor-management relations or policies.

§ 790.12 “Portion of the day.”

A “preliminary” or “postliminary” activity of the kind referred to in section 4 of the Portal Act is compensable under a contract, custom, or practice within the meaning of that section “only when it is engaged in during the portion of the day with respect to which it is so made compensable.”⁸⁴ This provision in no way affects the compensability of activities performed within the workday proper or the computation of hours worked within such workday for purposes of the Fair Labor Standards Act;⁸⁵ the provision is applicable only to walking, riding, traveling or other “preliminary” or “postliminary” activities of the kind described in section 4(a) of the Portal Act,⁸⁶ which are engaged in outside the workday, during the portions of the day before performance of the first

⁷⁹ Statements of Representative Gwynne, 93 Cong. Rec. 1566.

⁸⁰ Senate Report, p. 45; colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

⁸¹ See § 790.9(d).

⁸² Senate Report, pp. 45, 49; colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

⁸³ Senate Report, pp. 45, 49.

⁸⁴ Section 4(c) of the Portal Act (set out in full in § 790.3).

⁸⁵ See §§ 790.4-790.6.

⁸⁶ Conference Report, pp. 12, 13.